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IN THE

Supreme Court of the United States

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF *AMICUS CURIAE* CENTER FOR CHILDREN'S POLICY PRACTICE & RESEARCH AT THE UNIVERSITY OF PENNSYLVANIA IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The Center for Children's Policy Practice & Research at University of Pennsylvania (hereinafter CCPPR) is a joint project of the University of Pennsylvania's Schools of Law, Medicine and Social Work.[1] It also draws associated faculty from every part of the campus, including Arts and Sciences, Business, Communications, Education, and Nursing. CCPPR employs a team structure in all its scholarly, advocacy, and research activities, assembling specialists from each relevant discipline to study and evaluate proposed and existing children's laws and policies in fields such as child welfare, education, juvenile justice and medicine. Faculty of CCPPR serve on task forces and advisory commissions and CCPPR provides expert advice to government agencies working with children. CCPPR also provides clinical services, using interdisciplinary teams of doctors, lawyers and social workers, to evaluate the needs of individual "at risk" children and their families.

The mission of CCPPR is to mobilize the resources of a nationally known university research faculty around issues of child welfare policy. Among our primary goals is to assure that courts and legislatures have access to a body of sound and reliable interdisciplinary research and analysis necessary

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1. The CCPPR faculty who participated in the research and drafting of this brief include specialists in child psychology, pediatric psychiatry, social work, family sociology, and legal history. Counsel for a party did not author this brief in whole or in part, and no other entity, other than amicus curiae, have made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37 of the Rules of this Court, the parties consented to filing of this brief, and copies of their consents have been filed with the Clerk of the Court.

to understanding children's issues and to evaluating the broader implications of laws and decisions affecting children.

The purpose of this Amicus Brief is to highlight the potential effects of this case on hundreds of thousands of children who are currently in state care or at risk of entering state care.

STATEMENT OF THE CASE

Amicus Curiae, the Center for Children's Policy Practice and Research, makes no comment on the statement of the case.

SUMMARY OF ARGUMENT

The judgment of the Washington Supreme Court should be affirmed, to the extent it rests on a finding that the statute was so vague as to subject children and their families to arbitrary intrusions by virtual strangers. While we support respondent's position that a statute allowing "any person at any time" to seek visitation is unconstitutionally vague, we urge the Court to proceed with caution. In deciding this case, it should avoid any language that would cast doubt on the authority of the courts to protect and promote the stability of over 3,000,000 children residing with kin and extended family and over 500,000 children in foster care. Extended family and kin networks play a central role in meeting the needs of America's "at risk" children and, in many circumstances, policies recognizing and supporting such relationships function to promote rather than undercut constitutional values of family autonomy. The state's role in protecting and preserving family relationships is qualitatively different from the forms of state intervention

this Court has previously addressed. State courts and legislatures should be free to protect and foster children's family relationships by developing family law statutes and case law that balance the needs, rights, and interests of all parties.

This Court should avoid sharpening the battle of rights over children by delineating a fixed scheme of constitutional priorities that unduly emphasizes the rights of parents and devalues the role of grandparents, extended family and informal kin. Such a ruling would impede the operation of recently enacted federal and state child welfare laws and policies. In many contexts, conferring rights on some family members to exclude others does not further family autonomy or privacy. Instead, it undermines policies that would strengthen the family by maximizing children's family resources and protecting children's family attachments. Nothing in the Court's jurisprudence should preclude state courts and legislatures from favoring reasonable family law and child welfare policies that protect extended family and kinship ties.

The framing of laws on custody and visitation has always been a matter of state law, and states have long recognized the importance of children's relationships with persons other than their parents. While the Court has held that the state may not *exclude* certain persons from the family, it has never dictated whom the state may permissibly *include*. The state has a compelling interest in protecting children's attachment relationships since those relationships are vital to the child's healthy development. Recognizing the diversity and individuality of family life, the Court should defer to the expertise of state and local entities currently engaged in generating appropriate standards to apply in individualized

adjudications. Family courts must retain their traditional authority, in deciding issues of children's custody and visitation, to examine the needs and interests of the child in the context of his or her unique familial history and cultural and social setting.

ARGUMENT

A. State agencies dealing with "at risk" children must be free to protect and foster children's relationships not only with parents but also with extended family and informal kin, as a means of preserving family autonomy and integrity and avoiding undue state intervention in the family.

This case involves a private custody dispute. However, the constitutional issues raised have broad ramifications for other adjudications involving custody and visitation, including cases in the public child welfare system. This Court should avoid a decision that suggests that parents who have not been held unfit have a constitutional right not only to maintain contact themselves with children but also to exclude other family members and informal kin from contact with children.[2] Such a decision would hamper judges and child welfare agencies seeking to assure children's rights to continuity and stability in their familial relationships. It would be especially harmful to the most vulnerable children — those

2. Throughout this brief, we use the term "extended family" to describe persons related to a child by blood, marriage or adoption and the term "informal kin" to describe persons who may lack a biological tie or legal tie, but are recognized as kin by the child and/or within the child's family and community. Examples include stepparents, Godparents, informal "Aunts" and "Uncles," and other de facto family members.

in foster care and formal or informal kinship placements, who look to extended family, Godparents, family friends and others in the community for a sense of permanency and family connection.

The following illustrations, drawn from actual child welfare and family court cases in the City of Philadelphia, show the harm and disruption that would follow were the Court to delineate such a right, even in dicta.

Illustration A:

> Alfred is a thirteen year old diabetic boy who has been in state custody for eight years. His mother is unable to assume responsibility for his care, because her mental illness prevents her from meeting his medical and emotional needs. His father died when he was ten. Alfred wishes to visit his paternal grandfather, to whom he is deeply attached, but his mother refuses permission without justification. Mother's parental rights have not been terminated.

Must the state child welfare agency honor the mother's directive, without consideration of the child's best interests or of the child's right to nurturing family relationships? Currently, a court is free to decide this case according to the best interest of the child. Alfred's family resources are precious and few. As he grows to adulthood, "aging out" of the foster care system, the support of extended family will become increasingly essential to his well-being. Assuming the grandfather is a responsible individual, Alfred's yearning for contact with his deceased father's family should outweigh his mother's arbitrary objection.

Illustration B:

> Betty is being raised by Mrs. G., her Godmother. Betty's biological mother left Betty in Mrs. G's care shortly after her birth. Betty has had sporadic contact with her mother but she refers to Mrs. G. as "Mommy" and views the G. children as her siblings. When Betty is five years old, the biological mother argues with Mrs. G. and then seeks a court order to regain custody of the child and to bar any further contact between Betty and Mrs. G and her children.

What options does the family court have to protect Betty's relationship with her Godmother? Here, the mother has acquiesced in creating a family relationship between her child and Mrs. G. A state might conclude that rules giving strict priority to the biological parent discourage blood and informal kin from coming to the aid of children in crisis. Relatives and informal kin, functioning as de facto parents, may be open to blackmail and coercion by a long absent biological parent if their relationship with the child is completely unprotected. In cases such as these, courts must be able to balance the rights of the parent with the needs of the child and fairness to the de facto parent. Most states wisely recognize standing to seek custody and visitation on the part of persons such as stepparents, grandparents and de facto parents who have served "in loco parentis" to a child.[3]

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3. *See infra* notes 30-37 and accompanying text.

B. A ruling suggesting that parents' possess broad autonomy rights to control a child's contact with extended family members would impede the functioning of recently enacted federal and state child welfare legislation.

An array of state laws on custody, adoption, guardianship, and foster care help mediate disputes over children within re-configured families and provide substitute families when children's families of origin are disrupted or cannot meet their needs. When the state intervenes to remove a child from his family, for example in a child abuse or neglect proceeding, it must show that state intervention is clearly necessary, not merely in the child's best interest.[4] In order to terminate a parent's rights, the state must show relevant state law grounds for termination by clear and convincing evidence.[5] However, with the exception of certain crucial decisional rights retained by the parent, once the child has been placed in care, the family court applies a best interest standard to decisions about the child's care.[6]

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4. *E.g., In re S.A.D.*, 382 Pa. Super. 166, 555 A.2d 123 (1989).

5. *Santosky v. Kramer*, 455 U.S. 755 (1982), holds that states must have "clear and convincing evidence" that the parents would be unable to care for the child before terminating parental rights. Any lesser standard would violate the parent's constitutional rights to due process under the Fourteenth Amendment.

6. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, n.20 (1977) notes that the parent of a child in foster care retains certain crucial rights such as the right to authorize surgery, give permission for marriage or military service.

To place the issues of kinship custody and visitation in a child welfare context, the next section will review current federal and state laws. Beginning with the Social Security Act of 1935, Congress has passed a sequence of federal laws that conditioned the receipt of funding to defray the costs of child welfare programs on the state's conformance with certain standards and procedures. The Adoption Assistance and Child Welfare Act of 1980 (hereinafter "AACWA") was passed in response to concerns that children were being removed unnecessarily from their homes and then left to drift in foster care. In AACWA, Congress created strong incentives for states to pass child welfare laws that would emphasize family preservation and reunification.[7] AACWA offered federal funds to the states for foster care and other services, but only if the state enacted laws guaranteeing that in each case, reasonable efforts will be made (A) prior to placement of a child in foster care to prevent or eliminate the need for removal or the child from his home and, (B) to make it possible for the child to return to his home. Only if the parent showed no progress over an extended period of time despite the state's best efforts, would it be appropriate to terminate the parent-child relationship and begin planning for adoption or permanent guardianship.

Alarmed by the rising numbers of children growing up in state care, Congress enacted various amendments to AACWA. In 1996, an amendment recommended that states give preference to placing children with relative care givers over a nonrelative.[8] The following year, the Adoption and

7. AACWA or PL 96-262, is codified at 42 U.S.C. §§ 620-629a, 670-679a.

8. 42 U.S.C. § 671(a)(19).

Safe Families Act (hereinafter "ASFA"),[9] introduced a new concept, the concept of "concurrent planning." Concurrent planning authorizes the agency to plan simultaneously for two mutually exclusive alternative options, such as adoption and reunification.[10] The operative language of ASFA reads:

> (F) reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts of the type described in subparagraph (B) [reunification/ preservation].

ASFA envisions that the agency be able to work concurrently with the parent, who still retains certain parental rights, and with others (preferably relatives) to plan for the future care of the child in the event the parent's efforts at rehabilitation should fail. Often, the most valuable resources for such children are extended family, Godparents, or other informal kin. Illustration C shows the danger posed by a ruling suggesting that the parent of a child in care has a right not only to regain custody and maintain contact, but also to exclude other family members from custody or contact.

Illustration C:

> Calvin and Carrie, are premature twins who tested positive for heroin exposure at birth. The twins are placed in state care while the parents enroll in a drug rehabilitation program as a first step toward regaining custody. The state agency

9. 42 U.S.C. § 671 & ff.

10. 42 U.S.C. § 675(F).

> responsible for Calvin and Carrie locates several kinship foster placements, one with their maternal aunt and an alternative placement with the paternal grandmother. Both are eager to provide a home for the children and both agree to adopt them, should their parents fail to overcome their addiction. The parents object, preferring that the infants be placed with unrelated foster parents rather than family members. They also object to visitation between the children and these relatives.

Does the state agency infringe the parents' constitutional rights by promoting kinship placements for children? In this case, the interests of the children in bonding with and being raised by family members, and the interests of the state in minimizing the children's time in state care and in utilizing available family care networks, should prevail over the arbitrary exercise by the biological parents of a right to exclude other family members from consideration. In these cases, a preference for kinship placements and adoptions actually serves to promote family privacy and autonomy by placing children in family care.

C. Relationships with extended family and unrelated kin serve the values of family autonomy, because they provide stability and continuity during periods of economic stress and structural change, reducing state displacement of the family as the unit of child rearing.

Nothing in the Courts prior cases suggests that the child welfare policies described above infringe family autonomy. As this section will explain, protection of ties to extended family and unrelated kin, may serve to preserve rather than to threaten the broad values of family autonomy so important

to a democratic society. Although the term "family" is nowhere mentioned in the U.S. Constitution, this Court has interpreted the scope of the "liberty" protected by the Fourteenth Amendment as reaching the rights to marry and raise a family. *Loving v. Virginia*, 388 U.S. 1 (1967) (fundamental right to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (same). *See also Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing that the family and not the state is responsible for child rearing); *Stanley v. Illinois*, 405 U.S. 645 (1972) (protecting children's family relationship with unmarried biological father); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (parents' rights to inculcate religious values). These cases have generally involved a conflict between the family and the state over educational, medical or police power intrusions. Their message is one of protecting the family from intrusive state intervention. While many of the Court's family autonomy cases involve parents, the Court has recognized autonomy and privacy rights in other family relationships. One of the earliest cases discussing family autonomy, *Prince v. Massachusetts*, 321 U.S. 158 (1944), involved an aunt and her niece. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court accorded constitutional protection to a grandmother and her grandson.

American families come in many shapes and sizes, and anthropologists remind us that the nuclear family, "[t]he one considered 'normal' or 'natural' to us is in fact no more normal or natural than any other."[11] Customs and practices vary among the many ethnic and cultural groups comprising our society, and the pattern of family life changes with changes in economic and social structures. In modern

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11. William A. Haviland, Anthropology 461 (6th ed. 1991); Jerome Kagan, The Nature of the Child 273-276 (1984).

America, the nuclear biological family is only one among a variety of family structures. Only half of the nation's children in 1994 lived in "traditional" nuclear families with their two biological parents.[12] In 1995, approximately 82% of Caucasian households were comprised of a married couple with children, while among Hispanics the figure was 68% and among African Americans the figure was 47%.[13] Within the population of children living in married, two-parent households, some 14% live with a parent and a stepparent. Approximately 4% of children live with neither parent.

Extended families are important to children from every ethnic and racial community. The latest reports from Pennsylvania, where CCPPR is located, indicate that over 150,000 children under eighteen live with grandparents — 5.4 % of the total number of children in the state. In Pennsylvania, there are more white, non-Hispanic children being raised by their grandparents than black children — 43.6 % compared with 35.9 %.[14] Nationally, the 1990 Census showed that 3.6% of white children and 12% of black children lived with their grandparents. In the past decade, the estimated number of children being raised in both formal and informal kinship arrangements rose from 2,000,000 to over 3,000,000. In 1993, over 3,368,000 American children lived in households identified as grandparent-headed households. In one third of these families, there was no parent

12. Arlene F. Saluter, *Marital Status and Living Arrangements*: March, 1994, Current Population Reports 20-484.

13. Lee E. Teitelbaum, *Rays of Light: Other Disciplines and Family Law*, 1 J. L. & Fam. Stud. 1, 5 (1999).

14. Jen Darr, *Unplanned Parenthood*, Phila. City Paper 25, 26 (December 9, 1999).

present, a figure which was on the rise, growing from 876,000 children in 1992 to 1,017,000 in 1993.[15] To put these data in perspective, approximately six times as many children are living with extended family as are currently being cared for by the state, in foster homes and institutional settings. Without the resources of grandparents and other kin, the numbers of children in state care would grow exponentially. For these families, the values of constitutional privacy and family autonomy are served by laws that protect extended and informal family ties.

Children whose families are in crisis, whether through divorce, death or illness, are especially likely to benefit from support of the extended family.[16] In addition to parents and extended family, various informal kinfolk can also play a crucial role in the child's safety net. Often, the family and community may confer the title of "grandparent" or "aunt" or "Godparent" on a person with no blood relationship to the child to signify a special relationship and a special obligation to the child.[17] Families of African-American,

15. Andrea G. Hunter & Robert J. Taylor, *Grandparenthood in African American Families*, 76, in Szinovacz (ed.) Handbook on Grandparenting (1998); American Association of Retired Persons, Going It Alone: A Closer Look at Grandparents Parenting Grandchildren n.1 (1994) (percentage of children living with grandparents but without a parent in the household increased by 17% between 1992 and 1993).

16. National Institute on Aging, Grandparents in American Society: A Review of Recent Literature (Rachel Pruchno, Ph.D. 1995); Andrew J. Cherlin & Frank F. Furstenberg, Jr., *Grandparents & Family Crisis*, Generations 10 (4), 26-28 (1986).

17. Oriol Pi-Sunyer & Zedneck Salzmann, Humanity and Culture: An Introduction to Anthropology 250-251 (1978). Among

(Cont'd)

Asian, or Hispanic cultural background have traditionally relied on the resources of extended family or informal kinship networks. Studies of African-American families show that supportive social networks, flexible relationships and roles within the family unit, and extensive use of extended family helping arrangements have served a vital role and have assisted families in weathering social and economic problems.[18] Studies of Chinese-American families show that child-rearing responsibility and authority may be shared by aunts, uncles, and family friends, with paramount authority often vested in a grandparent.[19] As these studies illustrate, while deference to the family is deeply rooted in American

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(Cont'd)
Latin Americans, the social institution of *compadrazgo*, or godparenthood, plays a crucial role, creating a core relational commitment between the child and sponsor as well as between the sponsor and the child's parents. *Id.* In a black community, friendships can develop "fictive kin" status, through sharing of caregiving responsibilities. Carol B. Stack, All Our Kin: Strategies for Survival in a Black Community 60 (1974).

18. Harriette P. McAdoo, *African-American Families: Strengths and Realities* in H. McCubbin, E Thompson, A. Thompson & J. Futrell, eds, Resiliency in Ethnic Minority Families 22 (1995); Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 Temple L. Rev. 1649, 1658-67 (1995).

19. Nina Wang Helmer, *Helping Chinese Families with Their Children's Psychiatric Problems*, American Academy of Child and Adolescent Psychiatry News 227-28 (Nov.-Dec. 1999) (citing D. Shrier, C. Hsu, X. Yang, *Cross-Cultural Perspectives on Normal Child and Adolescent Development: Chinese and American*, in II International Review of Psychiatry 301-66 (F.L. Mak & C.C. Nadelson, eds. 1996)).

history and tradition, the American family is highly diverse in its structures, its functioning, and its traditions. One way to protect broader family autonomy values is to recognize and support children's kinship structures in formulating policies for children in state care or at risk of entering state care.

D. The Constitution protects the family from invidious state intrusion, but it does not dictate how state courts, in their roles as mediators of intra family disputes or as guardians of children's rights to family relationships, must resolve conflicts between family members.

While the Court has held that the Constitution protects "the family," writ large, it has never assumed the role of discriminating among family members or of determining who among the parties in a family matter should take priority. The historical record demonstrates that, since the early days of the Republic, state legislatures and courts have determined as a matter of state law which persons claiming family status have standing to seek custody or visitation and which persons may be accorded rights and charged with responsibilities toward the child. The historical record also demonstrates the traditional power of the states to reformulate their approach to custody and visitation to recognize changes in family life. Women's equality, emerging recognition of children's rights, new research in child psychology, and new social and legal developments such as no fault divorce, adoption, and unmarried parenthood, have reshaped the structures and redefined the needs of American families and states have responded by modifying their laws on custody and visitation.

Colonial era laws recognized the father's rights as superior to all others. Nevertheless, local courts always had the power to deviate from this rule in individual cases.[20] By the 1840s, various states had adopted laws or doctrines rejecting the paternal preference in favor of the best interest standard, and holding that "the rights of the parents to their children, in the absence of misconduct, are equal and the happiness and welfare of the child are to determine its care and custody."[21] According standing to extended family and informal kin is nothing new. Nineteenth century disputes involved not only biological parents, but stepparents, grandparents, extended family members, parents by equitable adoption, or persons standing "in loco parentis." These surrogate parents often prevailed over fit biological parents, when courts found that the surrogate parenting relationship served the child's best interest.[22] The balancing of competing claims to contact with and custody of children is quintessentially a state law matter. As the Texas Supreme Court in 1894 summarized the State's role:

> "The State, as protector and promoter of the peace of organized society, is interested in the proper education and maintenance of the child, to the end

20. Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 236 (1985).

21. See Grossberg, at p. 241, n.13. *See also Ahrenfeldt v. Ahrenfeldt*, 1 Hoffm. Chan. 497, 502 (N.Y. 1840); *People v. Mercein*, 25 Wend. 64 (N.Y. 1840).

22. *See Chapsky v. Wood*, 26 Kan. 650 (1881) (confirming custody with an aunt); *Green v. Campbell*, 35 W. Va. 699 (1891) (grandparents); *Sheers v. Stein*, 75 Wis. 44 (1889) (aunt); *Jones v. Darnall*, 103 Ind. 569 (1885) (maternal grandparents).

> that it may become a useful instead of a vicious citizen; and while as a general rule it recognizes the fact that the interest of the child and society is best promoted by leaving its education and maintenance, during minority, to the promptings of paternal affection, untrammeled by surveillance of government, still it had the right in proper cases to deprive the parent of custody of the child when demanded by the interests of child and society."

Legate v. Legate, 87 Tex. 248, 251 (1896) (recognizing the claims of a child's foster parents to continued custody).

Custody and visitation laws have also changed in response to new discoveries in the science of child development and to new challenges in the sociology of the family. Examples include the creation during the Nineteenth Century of adoption laws and the development during the Twentieth Century of rules for shared or joint custody and court ordered visitation with persons other than the custodial parent. These new laws responded to basic changes in society and, more importantly, to basic research establishing children's needs for permanency and for continuing contact with important family figures. States must have wide latitude to respond to the evolving needs of children and families, without encountering a constitutional straight jacket that confines family, and thus family autonomy, to its narrowest definition.

This Court has intervened in the past when the State attempted to confine the scope of family to the nuclear model of a married couple and their children, thereby infringing on family autonomy. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), a zoning ordinance defined "family" so

narrowly as to preclude a child from residing with his paternal grandmother after his mother had died. The Court interpreted its precedents as protecting the extended family as well as the nuclear family from state intrusion, noting that "[e]specially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." 431 U.S. at 505. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court held that an unmarried father who had lived with and supported his children and their mother for many years in a common law relationship could not be treated as a mere stranger by the state following the mother's death.[23]

While the Court, in cases like *Moore* and *Stanley*, has held that the state may not impermissibly *exclude* certain persons from the definition of family, it has never dictated whom the state may permissibly *include*. Imagine, for example, that Inez Moore's son, who had left his child in

23. *Stanley* and its aftermath provide a note of caution regarding the unintended consequences to children of broadly worded decisions. Dicta in *Stanley* seemed to suggest that a man might assert paramount rights over a child based purely on biological paternity. 405 U.S. at n.9 (all unmarried fathers are constitutionally entitled to notice and an opportunity to be heard). This dicta spawned great uncertainty about the authority of the states to enter an adoption decree without express consent from the child's biological father–even when the identity and whereabouts of the father were unknown and the child had been living for years in foster care. It required many years and a long sequence of decisions to clarify that a "developed relationship" with the child is a necessary component of the biological parent's constitutional right. *See Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

her care at age one, following the death of the child's mother, suddenly returned and sought to prevent any further contact between grandchild and grandmother. Nothing in the Court's family jurisprudence suggests that the Constitution would prevent the State of Ohio from protecting the relationship between grandmother and grandchild. In past, the Court has carefully avoided displacing the power of the states to determine rights and priorities among persons claiming family membership. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the Court sustained against constitutional challenge a California statute that prevented the unmarried biological father of a child born to a married woman from seeking custody or visitation. The Court declined the invitation to declare that either the marital or the biological father had a superior liberty interest in a relationship with the child. "Our disposition does not choose between these two 'freedoms' [of the marital father and the biological father], but leaves that to the people of California." 491 U.S at 130. As *Michael H.* illustrates, many factors besides the rights of a biological parent are at play in state policies regarding child custody and visitation. The Constitution allows wide latitude in developing family laws and policies that balance the interests of child and state with the interests of persons claiming family membership.

Of course, a state law framed so broadly as to obliterate the meaning of "family" may impermissibly intrude on the privacy and liberty of the family. The Washington Court interpreted the statute at issue in this case as permitting "any person" to seek visitation "at any time" without establishing a threshold showing of any kind. Interpreted thus, the statute authorizes virtual strangers to intervene in family matters. Visitation with family intimates to whom a child is attached, however, stands on a different footing.

E. The state has a compelling interest in protecting children's attachment relationships, since those relationships are vital to the child's healthy development.

From a developmental perspective, "the family is the basic unit of growth and experience, fulfillment or failure."[24] The child's family relationships take many forms and are defined by the child's interactions with family figures. Modern developmental psychology and neurology confirm the critical importance to children of "attachment relationships." An attachment relationship is defined as "a reciprocal, enduring, emotional, and physical affiliation between a child and a caregiver" through which children "form their concepts of self, others and the world."[25] The child who does not have the opportunity to be loved, comforted, and cared for by a nurturant adult or family grows with significantly more risk for psychopathology and arrested developmental potential. Attachment relationships serve to create the central foundation from which the mind develops. They are the major environmental factor that shapes the development of the brain during its period of maximal growth. Studies of brain development have shown that human connection actually creates neuronal connections.[26] There is also clear evidence that attachment relationships confer resilience and promote more flexible modes of adaptation in

24. Nathan W. Ackerman, The Psychodynamics of Family Life 15 (1953).

25. Beverly James, Handbook for Treatment of Attachment-Trauma Problems in Children 1-3 (1994).

26. Daniel J. Seigel, The Developing Mind: Toward a Neurobiology of Interpersonal Experience 67-120 (1999).

the face of adversity. It is also clear that neglect and trauma in childhood have a toxic effect on brain development as evidenced by hippocampal atrophy and memory deficits in stress.[27]

Sometimes a child's most crucial attachment relationship is formed with a person who has assumed the functional role of parent but is not the legal or biological parent. Rupture of such a relationship can be emotionally devastating to the child. While all children need at least one individual to love and be loved by, children's attachment needs may be met through consistent, quality care provided by multiple attachment relationships, as is common in interdependent extended families and tribal and clan systems.[28] It is undisputed, however, that attachment relationships are vital to children's normal and healthy development.

F. The Court should defer to the expertise of state legislatures, state courts, and bodies such as the American Law Institute, currently engaged in the task of generating appropriate standards to apply in authorizing court ordered visitation with extended family and informal kin.

In response to research on child development and the importance of children's attachment relationships, the strong trend in recent years has been towards broadening courts authority to order visitation with extended family and kin. Despite the trend towards broadening visitation, there is still

27. *Id.* at 1-23.

28. Albert J. Solnit, Barbara F. Nordhaus, Ruth Lord, When Home is No Haven: Child Placement Issues 2 (1992).

a substantial amount of experimentation regarding the circumstances in which to grant standing to persons other than a parent to petition for visitation and when to grant such visitation. In dealing with children in state care, the trend is towards increasing use not only of kinship custody but also of sibling visitation and contact with extended family to maintain the child's sense of continuity and stability.[29]

Some state custody statutes provide that persons whom we have referred to as extended family or informal kin, who are neither parents nor grandparents, may petition for visitation. These include great-grandparents,[30] stepparents,[31]

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29. Faith Johnson Bonecutter & James P. Gleeson, *Broadening Our View: Lessons from Kinship Foster Care* in The Challenge of Pemanency Planning in a Multicultural Society (Gary R. Anderson, *et al.*, eds. 1997).

30. Ariz. Rev. Stat. Ann. § 25-409 (West, WESTLAW through 1999 1st Reg. Sess. and 1st & 2nd Spec. Sess.); Ark. Code Ann. § 9-13-103 (WESTLAW through 1999 Reg. Sess.); Idaho Code § 32-719 (LEXIS, WESTLAW through 1999 Reg. Sess.); 750 Ill. Comp. Stat. 5/607 (West, WESTLAW through P.A. 91-6, apv. 5/28/1999); Iowa Code Ann. § 598.35 (West, WESTLAW through 8/18/1999); Minn. Stat. Ann. § 257.022 (West, WESTLAW through 1998 1st Sp. Sess.); N.D. Cent. Code § 14-09-05.1 (LEXIS, WESTLAW through 1999 Reg. Sess.); Okla. Stat. Ann. tit. 10, § 5 (West, WESTLAW through 1999 1st Ex. Sess., ch. 6); 23 Pa. Cons. Stat. Ann. § 5313(a) (West, WESTLAW through 1999, Act 37); Wis. Stat. Ann. § 767.245 (West through 1999, Act 7).

31. Cal. Fam. Code § 3101 (West, WESTLAW through 1997-98 Reg. Sess. and 1st Ex. Sess.); 750 Ill. Comp. Stat. 5/607 (West, WESTLAW through P.A. 91-6, apv. 5/28/1999); La. Civ. Code Ann. art. 136 (West, WESTLAW through all 1998 1st Ex. Sess. and Reg. Sess. Acts); Tenn. Code Ann. § 36-6-303 (WESTLAW through 1998 Reg. Sess.); Wis. Stat. Ann. § 767.245 (West through 1999, Act 7).

siblings,[32] and relatives,[33] or persons who have either maintained a parent-child relationship with the child or who once had physical custody of the child.[34] Only a few states, in addition to Washington, allow *any* person to join or initiate an action for visitation.[35] In all, at least twenty-one state statutes specifically allow persons in addition to grandparents to petition for visitation. Finally, even in states where there is no statutory grant of standing to other third parties, many courts have exercised their discretion to grant visitation to third parties when it would be in the best interest of the child[36]

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32. 750 Ill. Comp. Stat. 5/607 (West, WESTLAW through P.A. 91-6, apv. 5/28/1999); La. Rev. Stat. Ann. § 9:344 (West, WESTLAW through all 1998 1st Ex.Sess. and Reg. Sess. Acts); N.J. Stat. Ann. § 9:2-7.1 (WESTLAW through L. 1999); R.I. Gen. Laws § 15-5-24.3(b) (West, WESTLAW through 1999 Reg. Sess.).

33. La. Rev. Stat. Ann. § 9:344 (West, WESTLAW through all 1998 1st Ex.Sess. and Reg. Sess. Acts); Ohio Rev. Code Ann. §§ 3109.051 (West, WESTLAW through 1999 portion of 123rd G.A.).

34. W. Va. Code §§ 48-2B-2 to -6 (LEXIS, WESTLAW through 1999 2nd Ex. Sess.); Wis. Stat. Ann. § 767.245 (West through 1999, Act 7).

35. Conn. Gen. Stat. Ann. § 46b-59 (West WESTLAW through Gen. St., Rev. to 1-1-99); Del. Code Ann. tit. 10, § 1031(7) (WESTLAW through 1998 Reg. Sess.); Minn. Stat. Ann. § 257.022 (West, WESTLAW through 1998 1st Sp. Sess.); Ohio Rev. Code Ann. §§ 3109.051 (West, WESTLAW through 1999 portion of 123rd G.A.).

36. *See, e.g., Collins v. Gilbreath*, 403 N.E.2d 921 (Ind. App. 1980); *Evans v. Evans*, 302 Md. 334, 488 A.2d 157 (Md. 1985); *Looper v. McManus*, 581 P.2d 487 (Okla. Ct. App. 1978); *Honaker v. Burnside*, 388 S.E.2d 322 (W. Va. 1989).

and/or when the third party has stood in loco parentis to the child.[37]

In addition to experimentation at the state level, the American Law Institute (hereinafter ALI) is in the process of drafting "principles" that address the issue of visitation rights for extended family and informal kin in the context of dissolution of marriage. In its Principles of the Law of Family Dissolution, the ALI suggests that in an action in which the custody of a child is in issue, some non-parents should have a right to be notified and to participate as parties, but not to initiate the action.[38] Those eligible to participate are de facto parents, defined as persons who have resided with the child within the six-month period prior to the filing of the action, or who have maintained or tried to maintain the parental relationship since no longer living with the child, and adults who are allocated custodial or decision-making responsibility in a current parenting plan regarding the child. In addition, in "exceptional" cases, a court may, in its discretion, grant permission to participate to an "intervenor," who could be a grandparent or other third party, whose participation it determines is likely to serve the child's best interests. However, an intervenor, like a de facto parent or an adult with custodial responsibility, cannot initiate an action. In this way, the ALI recognizes the potentially valuable contributions of non-parents. The ongoing activity of the ALI

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37. *See, e.g., In re Marriage of Dureno*, 854 P.2d 1352 (Colo. Ct. App. 1992), *cert. denied*, 1993 Colo. Lexis 584 (Colo. July 6, 1993); *Hickenbottom v. Hickenbottom*, 477 N.W.2d 8 (Neb. 1991); *Spells v. Spells*, 378 A.2d 879, 250 Pa. Super. 168 (Pa. Super. Ct. 1977).

38. American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.04 (Tentative Draft No. 3, 1998).

and in state courts and legislatures is evidence of the complexity of the issues and suggests that the Court should tread cautiously in this area, allowing development of policies and practices at the state level.

CONCLUSION

The Center for Children's Policy Practice & Research respectfully requests that the Court affirm the decision below, on the ground that the Washington statute, as interpreted by the Washington Supreme Court, is so broad and vague as to subject the family to intrusion from virtual strangers. The Washington Court acted properly by instructing its legislature to clarify the sweep of the law.

However, we respectfully urge the Court to avoid suggesting, in its holding or its discussion of this case, that the Constitution ordains a fixed priority of rights among family members or that the state infringes parental rights by seeking to protect children's extended family and informal kin relationships. Such a holding would cast doubt on current child welfare policies and practices intended to enhance family autonomy and avoid the necessity of children being raised by the state instead of by their own families.

Respectfully submitted,

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